IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.SASIDHARAN NAMBIAR

WEDNESDAY, THE 3RD JANUARY 2007 / 13TH POUSHA, 1928

WP(C).No. 34881 of 2005(C)

AS.109/2003 of SUB COURT, OTTAPPALAM
OS.121/2000 of MUNI-MAGI.COURT,MANNARKAD
(IA.351/03)

.....

PETITIONER:

K.V.BALAKRISHNAN, AGED 46 YEARS,
S/O.VELAYUDHAN, KUTTIKKATTIL HOUSE,
KARIMBA AMSOM DESOM,
MANNARKKAD, PALAKKAD DISTRICT.

BY ADV. SRI.U.MUHAMMED MUSTHAFA
SRI.K.ABDUL JAWAD

RESPONDENT:

S.SIRAJUDHEEN, AGED 56 YEARS,
S/O.CHELLAPPA RAWTHER,
EDAYAR STREET, KOPPAM AMSOM DESOM,
PALAKKAD.

BY ADV. SRI.SANTHEEP ANKARATH

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON 03/01/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

W.P.(C)34881/05

APPENDIX

PETITIONER'S EXHIBITS

EXT.P1: TRUE COPY OF COMMON JUDGMENT DATED 7/7/05 IN C.R.P.NOS.1179/04, 1181/04 AND 1208/04.

EXT.P2: TRUE COPY OF MEMO SHOWING THE REMITTANCE OF COURT FEE IN A.S.109/03.

EXT.P3: TRUE COPY OF JUDGMENT DATED 22.9.05 IN A.S.109/03 IN O.S.121/00 PASSED BY THE COURT OF SUBORDINATE JUDGE, OTTAPPALAM.

EXT.P4: TRUE COPY OF REVIEW PETITION AS I.A.1183/05 IN A.S.109/03 FILED BY PETITIONER.

EXT.P5: TRUE COPY OF I.A.351/03 IN O.S.121/00 OF MUNSIFF COURT, MANNARKAD.

/TRUE COPY/

PA TO JUDGE.

M.SASIDHARAN NAMBIAR,J.

W.P.(C)NO.34881 OF 2005

DATED THIS THE 3rd DAY OF JANUARY, 2007

JUDGMENT

Petitioner is the defendant in O.S.121/2000 on the file of Munsiff Court, Mannarkkad and respondent, the plaintiff. The suit was decreed. Appeal was not filed in time. Petitioner filed the appeal along with an application under Section 5 of the Limitation Act to condone the delay in filing the appeal as well as an application for permission to sue as an indigent person and another application under Order XLI Rule 5(2) of Code of Civil Procedure to stay the execution of the decree. The appeal was numbered as A.S.109/03. Learned Sub Judge dismissed all the applications. Consequently the appeal was also dismissed. Petitioner challenged the said orders in C.R.P.1179/04. As per Ext.P1 judgment dated 7.7.05, this Court allowed I.A.1451/03, the application filed under Section 5 of the Limitation Act to condone the delay in filing the appeal. The order in I.A.1450/03, the application for permission to prefer an appeal as an indigent person, which was dismissed was confirmed. I.A.1452/03, application under order XLI Rule 5(2) was restored and learned Sub Judge was directed to pass necessary orders therein. In view of the confirmation of the order in I.A.1450/03, this Court granted fifteen days time to petitioner to remit

the required fee in the appeal. The relevant portion of the order reads:

> "Considering the various aspects that are placed before me. I grant 15 days time from the date of production of a copy of this order before the Court below to remit the required court fee in the appeal."

Thereafter under Ext.P3 order, the appeal was dismissed. It reads:

> "Court fee not yet paid. No representation also. Appeal stands dismissed for non-compliance of the order of the Hon'ble High Court."

2. This petition is filed under Article 227 of Constitution of India contending that on 22.9.05 itself petitioner had filed Ext.P2 memo along with copy of Ext.P1 order and 1/3 court fee as required, was remitted and without taking note of this fact, Ext.P3 order was passed and therefore the order is to be quashed.

3. Learned Counsel appearing for petitioner and respondent were heard.

4. Learned Counsel appearing for petitioner submitted that under Ext.P1 order, petitioner has to remit the required court fee in the appeal within fifteen days from the date of production of a copy of Ext.P1 order and Ext.P1 order was received by the Counsel appearing for petitioner before this Court on 2.9.05 and it was sent to the Counsel appearing for petitioner before Sub Court, Ottapalam

and on 22.9.05 it was produced and required court fee was deposited and therefore it is in compliance with the directions in Ext.P1 order and hence the dismissal under Ext.P3 is to be quashed.

5. Learned Counsel appearing for petitioner argued that an order dismissing an appeal for non payment of Court fee is an appealable order and therefore the petition under Article 227 of Constitution of India is not maintainable. Learned Counsel also argued that as per Ext.P2 memo, only 1/3 of the court fee was paid and the entire court fee required for the appeal was not deposited and therefore Ext.P3 order is perfectly correct.

6. And seen from Ext.P1 order, this Court allowed the application to condone the delay and directed the appellate Court to entertain the appeal. As the order in I.A.1450/2000 was confirmed and permission to prefer an appeal as an indigent person was refused, the required court fee in the appeal is to be paid. Petitioner was granted fifteen days time to remit the required court fee. The order shows that, that fifteen days time is to be computed from the date of production of copy of the order before the Court. Petitioner produced the order only under Ext.P2 ,on 22.9.05. Ext.P2 shows that 1/3 court fee, which is required to be paid at the time of filing the appeal was also remitted. This fact was not taken note of by learned Sub Judge and under Ext.P3, it was dismissed. Ext.P3 order was passed without taking note of Ext.P2 memo or the

payment of the Court fee stated therein. In such circumstances, Ext.P3 order is quashed.

Learned Sub Judge is directed to restore A.S.109/03 and to dispose the same in accordance with law. Learned Sub Judge to consider whether the required court fee has been paid and if so, dispose the same as expeditiously as possible.

M.SASIDHARAN NAMBIAR,JUDGE

Acd